The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms

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Summary

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612) requires federal agencies to assess the impact of their forthcoming regulations on "small entities" (i.e., small businesses, small governments, and small not-for-profit organizations). For example, the act requires the analysis to describe why a regulatory action is being considered; the small entities to which the rule will apply and, where feasible, an estimate of their number; the projected reporting, recordkeeping, and other compliance requirements of the rule; and any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities. This analysis is not required, however, if the head of the agency certifies that the rule will not have a "significant economic impact on a substantial number of small entities." The RFA does not define "significant economic impact" or "substantial number of small entities," thereby giving federal agencies substantial discretion regarding when the act's requirements are triggered. Other requirements in the RFA and elsewhere (e.g., that agencies reexamine their existing rules, develop compliance guides, and convene advocacy review panels) also depend on the whether the agencies determine that their rules have a "significant" impact on a "substantial" number of small entities.

GAO has examined the implementation of the RFA many times during the past 20 years, and has consistently concluded that the lack of clear definitions for key terms like "significant economic impact" and "substantial number of small entities" have hindered the act's effectiveness. Therefore, GAO has repeatedly recommended that Congress define those terms, or give the Small Business Administration or some other federal agency the authority and responsibility to do so.

In the 112th Congress, H.R. 527, the Regulatory Flexibility Improvements Act of 2011, proposes to (among other things) define "economic impact" as including indirect effects that are "reasonably foreseeable," and require the chief counsel for advocacy of the Small Business Administration to issue rules governing agency compliance with the RFA. The bill would also broaden the definition of a covered rule, and would expand the use of advocacy review panels before proposed rules are published.

This report will be updated as events warrant.

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Regulatory Flexibility Act Requirements

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612), requires federal agencies to assess the impact of their forthcoming rules on "small entities," which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under the RFA, virtually all federal agencies (i.e., Cabinet departments and independent agencies as well as independent regulatory agencies) must prepare a regulatory flexibility analysis at the time that proposed and certain final rules are published in the *Federal Register*. The analysis for a proposed rule is referred to as an "initial regulatory flexibility analysis" (IRFA), and the analysis for a final rule is referred to as a "final regulatory flexibility analysis" (FRFA). The act requires the analyses to describe, among other things, (1) why the regulatory action is being considered and its objectives; (2) the small entities to which the rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the rule; and, for final rules, (4) steps the agency has taken to minimize the impact of the rule on small entities, including the alternatives considered and why the selected alternative was chosen.

However, these analytical requirements are not triggered if the head of the issuing agency certifies that the rule would not have a "significant economic impact on a substantial number of small entities" (hereafter referred to as a "SEISNSE"). The RFA does not define "significant economic impact" or "substantial number of small entities," thereby giving federal agencies substantial discretion regarding when the act's analytical requirements are initiated. Also, the RFA's analytical requirements do not apply to final rules for which the agency does not publish a proposed rule.[1]

The RFA also contains several other notable provisions. For example, Section 602 requires each federal agency to publish a "regulatory flexibility agenda" in the *Federal Register* each April and October listing regulations that the agency expects to propose or promulgate which are likely to have a SEISNSE.[2] Section 612 of the act requires the Chief Counsel of the Small Business Administration's (SBA's) Office of Advocacy to monitor and report at least annually on agencies' compliance with the act. The statute also specifically authorizes the Chief Counsel to appear as *amicus curiae* (i.e., "friend of the court") in any court action to review a rule.

The RFA initially did not permit judicial review of agencies' actions under the act. However, amendments to the act in 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA) (110 Stat. 857, 5 U.S.C. §601 note) permitted judicial review regarding, among other things, agencies' regulatory flexibility analyses for final rules and any certifications that their rules will not have a SEISNSE. As a result, for example, a small entity that is adversely affected or aggrieved by an agency's determination that its final rule would not have a significant impact on small entities could seek judicial review of that determination within one year of the

[1] Many agencies are apparently aware of this limitation; the General Accounting Office (GAO, now the Government Accountability Office) estimated that in more than 500 final rules published in 1997 the agencies specifically stated that the RFA was not applicable or that a regulatory flexibility analysis was not required because the action was not preceded by an NPRM. See U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126, Aug. 31, 1998, p. 31.

[2] This requirement, as well as a similar requirement in Executive Order 12866, is generally met via entries in the *Unified Agenda of Federal Regulatory and Deregulatory Actions*. The *Unified Agenda* is published twice each year in the *Federal Register* by the Regulatory Information Service Center, and provides uniform reporting of data on regulatory activities under development throughout the federal government. For more information, see CRS Report R40713, *The Unified Agenda: Implications for Rulemaking Transparency and Participation*, by Curtis W. Copeland.

date of the final agency action. In granting relief, a court may remand the rule to the agency or defer enforcement against small entities. The addition of judicial review in 1996 is generally viewed as a significant strengthening of the RFA, and is believed to have improved agencies' compliance with the act.[3]

In August 2002, President George W. Bush issued Executive Order 13272, which was intended to promote compliance with the RFA.[4] The executive order requires agencies to issue written procedures and policies to ensure that the potential impacts of their draft rules on small entities are properly considered, and requires them to notify the Office of Advocacy of any draft rules with a SEISNSE. Also, the order requires the SBA Chief Counsel for Advocacy to "notify agency heads from time to time" of the requirements of the RFA, and to provide training to agencies on RFA compliance. It also permits the Chief Counsel to provide comments on draft rules to the issuing agency and to the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget. The Office of Advocacy published guidance on the RFA in 2003 and reported training more than 20 agencies on compliance with the act in FY2005.[5]

Other Requirements Are Linked to RFA Determinations

In addition to triggering an initial or final regulatory flexibility analysis, an agency's determination that a rule has a SEISNSE can initiate other actions. For example, when enacted in 1980, Section 610 of the RFA required agencies to publish a plan in the *Federal Register* within 180 days that would provide for the review of all of their then-existing rules within 10 years, and for the review of all subsequent rules within 10 years of their publication as a final rule. The Section 610 requirement applies to those rules that the agencies determined "have or will have" a SEISNSE, and the purpose of the review is to determine whether the rule should be continued without change or should be amended or rescinded to minimize its impact on small entities. One way some agencies have decided which rules should be reviewed is by focusing only on those rules for which a final regulatory flexibility analysis was conducted at the time the final rule was issued. However, other agencies view Section 610 as requiring them to review all of their rules to determine whether they have currently a SEISNSE, regardless of their previous determinations.[6]

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[3] U.S. Small Business Administration, *20 Years of the Regulatory Flexibility Act: Rulemaking in a Dynamic Economy* (Washington: 2000).

[4] U.S. President (Bush), "Proper Consideration of Small Entities in Agency Rulemaking," Executive Order 13272, 67 *Federal Register* 53461, Aug. 13, 2002. This executive order essentially formalized agreements that had been in place for more than seven years. In response to a previous GAO recommendation, on Jan. 11, 1995, the SBA Chief Counsel for Advocacy and the OIRA Administrator exchanged letters committing the two offices to work together more closely. Specifically, SBA said it would develop new guidance for agencies to follow in complying with the act, and would provide OIRA with a copy of any comments it files with an agency concerning compliance with the RFA. OIRA said it would consider RFA compliance as part of its reviews under Executive Order 12866, and would include SBA in the process when appropriate. See U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/T-GGD-95-112, Mar. 8, 1995, pp. 4-5.

[5] See U.S. Small Business Administration, Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (Washington: May 2003), available at http://www.sba.gov/advo/laws/rfaguide.pdf. The Office of Advocacy had issued similar guidance previously. For example, see U.S. Small Business Administration, Office of Advocacy, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies* (Washington: 1998), available from the author to congressional clients upon request.

[6] GAO reported in 1999 that EPA conducted Section 610 reviews only for rules that it concluded had a SEISNSE at the time the final rules were promulgated. The Department of Transportation, on the other hand, interpreted the statute to require a review of all rules. See U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations*

Either way, agencies have considerable discretion in deciding what constitutes a "significant" impact and a "substantial" number of small entities, and therefore what rules (if any) are covered by this requirement.

SBREFA established two new requirements that are also triggered by agencies' determinations under the RFA—e.g., compliance guides and advocacy review panels.

Compliance Guides

Section 212 of SBREFA requires agencies to develop one or more compliance guides for each final rule or group of related final rules for which the agency is required to prepare an FRFA.[7] Specifically, Section 212 requires the guides to be posted in an easily identifiable location on the agency's website and distributed to "known industry contacts," be entitled "small entity compliance guides," and explain the actions a small entity is required to take to comply with an associated final rule. The statute also requires the guide to be published not later than the date that the associated rule's requirements become effective. However, an agency does not have to prepare the compliance guides at all if it determines that the rule or group of rules does not have a "significant" economic impact on a "substantial" number of small entities.

Advocacy Review Panels

Section 244 of SBREFA amended Section 609 of the RFA to require the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene "advocacy review panels" before publishing an IRFA for a proposed rule. The Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010) required the new Consumer Financial Protection Bureau (CFPB) to also hold such panels.[8] Specifically, the agency issuing the regulation (either EPA, OSHA, or CFPB) must notify the SBA Chief Counsel for Advocacy and provide information on the draft rule's potential impacts on small entities and the type of small entities that might be affected. The Chief Counsel then must identify representatives of affected small entities within 15 days of the notification. The review panel must consist of full-time federal employees from the rulemaking agency, the Office of Management and Budget, and SBA's Chief Counsel for Advocacy. During the panel process, the panel must collect the advice and recommendations of representatives of affected small entities about the potential impact of the draft rule. The panel must report on the comments received and on its recommendations no later than 60 days after the panel is convened, and the panel's report must be made public as part of the rulemaking record.[9] However, EPA, OSHA, and CFPB do not have to hold an advocacy review panel at all if the issuing agency certifies that the subject rule will not have a "significant" economic impact on a "substantial" number of small entities.

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of Review Requirements Vary, GAO/GGD-99-55, Apr. 2, 1999, pp. 11-12.

[7] Section 212 was amended by Subtitle C of the U.S. Troop Readiness, Veterans Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (P.L. 110-28, May 25, 2007). This description includes those amendments.

[8] The CFPB is scheduled to be established on July 21, 2011. For more information, see CRS Report R41338, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title X, The Consumer Financial Protection Bureau*, by David H. Carpenter.

[9] For an examination of how the first five advocacy review panels were implemented, see U.S. General Accounting Office, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-98-36, March 18, 1996.

GAO Assessments of the RFA's Implementation

The Government Accountability Office (GAO, formerly the General Accounting Office) has commented on the implementation of the RFA numerous times within the past 20 years, and a recurring theme in GAO's reports is a lack of clarity in the act regarding key terms and a resulting variability in the act's implementation. For example, in 1991, GAO reported that each of the four federal agencies that it reviewed had a different interpretation of key RFA provisions—most notably, what constitutes a "significant" economic impact or a "substantial" number of small entities.[10] In 1994, GAO again reported that agencies' compliance with the RFA varied widely from one agency to another and that agencies were interpreting the statute differently.[11] In a 1999 report on the implementation of Section 610 of the RFA and in a 2000 report on the implementation of the RFA at EPA, GAO concluded that agencies had broad discretion to determine what the statute required.[12] In the 2000 report, GAO determined that EPA had certified virtually all of its rules after 1996 as not having a SEISNSE, and that the rate of certifications increased substantially after the passage of SBREFA. In all of these reports, GAO suggested that Congress consider clarifying the act's requirements, give SBA or some other entity the responsibility to develop criteria for whether and how agencies should conduct RFA analyses, or both. In 2001, GAO testified that the promise of the RFA may never be realized until Congress or some other entity defines what a "significant economic impact" and a "substantial number of small entities" mean in a rulemaking setting. [13]

In 2002, GAO again testified that the implementation of the RFA was still problematic, and raised more questions about how the statute should be interpreted.[14] For example, GAO said, in determining whether a rule has a significant impact on small entities, should agencies take into account the cumulative impact of similar rules in the same area? Should agencies consider the RFA triggered when a rule has a significant positive impact on small entities? GAO went on to say the following:

> These questions are not simply matters of administrative conjecture within the agencies. They lie at the heart of the RFA and SBREFA, and the answers to the questions can have a substantive effect on the amount of regulatory relief provided through those statutes. Because Congress did not answer these questions when the statutes were enacted, agencies have had to develop their own answers—and those answers differ. If Congress does not like the answers that the agencies have developed, it needs to either amend the underlying statutes and provide what it believes are the correct answers or give some other entity the authority to issue guidance on these issues.[15]

In 2006, GAO again testified that "the full promise of RFA may never be realized until Congress clarifies key terms and definitions in the Act, such as 'a substantial number of small entities,' or

[10] U.S. General Accounting Office, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-16, Jan. 11, 1991.

[11] U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/GGD-94-105, Apr. 27, 1994.

[12] U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55, Apr. 2, 1999; U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000.

[13] U.S. General Accounting Office, *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified*, GAO-01-669T, Apr. 24, 2001.

[14] U.S. General Accounting Office, *Regulatory Flexibility Act: Clarification of Key Terms Still Needed*, GAO-02-491T, Mar. 6, 2002.

[15] Ibid., pp. 2-3.

provides an agency or office with the clear authority and responsibility to do so."[16] In addition to the areas raised previously, GAO said that numerous other issues regarding the RFA remain unresolved, including

- how Congress believes that the economic impact of a rule should be measured (e.g., in terms of compliance costs as a percentage of businesses' annual revenues, the percentage of work hours available to the firms, or some other metric);
- whether agencies should count the impact of the underlying statutes when determining whether their rules have a significant impact;
- what should be considered a "rule" for purposes of the requirement that agencies review their rules within 10 years of their promulgation; and
- whether agencies should review all rules that had a SEISNSE at the time they were originally published as final rules, or only those rules that currently have that effect.

Therefore, GAO said "Congress might wish to review the procedures, definitions, exemptions, and other provisions of RFA to determine whether changes are needed to better achieve the purposes Congress intended." Also, GAO said "attention should ... be paid to the domino effect that an agency's initial determination of whether RFA is applicable to a rulemaking has on other statutory requirements, such as preparing compliance guides for small entities and periodically reviewing existing regulations."

Although GAO has consistently called for greater clarity in the RFA's requirements, other observers have indicated that the definitions of key terms like "significant economic impact" and "substantial number of small entities" should remain flexible because of significant differences in each agency's operating environment. Notably, the SBA Office of Advocacy said that "[n]o definition could, or arguably should, be devised to apply to all rules given the dynamics of the economy and changes that are constantly occurring in the structure of small-entity sectors."[17] In its guidance on the RFA, SBA said the lack of clear definitions in the act "does not mean that Congress left the terms completely ambiguous or open to unreasonable interpretations."[18] Quoting the legislative history of the act in 1980, SBA said the diversity of both the community of small entities and of rules themselves makes a precise definition of the term "significant economic impact" virtually impossible and possibly counterproductive. Illustrative examples of "significant" economic impacts cited in the guidance range widely—from $500 in compliance costs to a 2% reduction in revenues if an industry's profits are 3% of revenues. Similarly, the guidance suggests that determinations of whether a "substantial number" of small entities are affected should begin with what it called the "more than just a few" standard, but ultimately does not require agencies to find that more than half of small entities would be affected.

[16] U.S. Government Accountability Office, *Regulatory Flexibility Act: Congress Should Revisit and Clarify Elements of the Act to Improve Its Effectiveness*, GAO-06-998, July 20, 2006.

[17] U.S. Small Business Administration, Office of Advocacy, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies* (Washington: 1998), p. 16.

[18] Ibid., p. 18.

Legislative Developments

In the 112th Congress, H.R. 527, the Regulatory Flexibility Improvements Act of 2011, proposes to amend the RFA "to ensure complete analysis of potential impacts on small entities of rules, and for other purposes." Section 2(a) of the bill would (if enacted) change the definition of a "rule" from those for which a notice of proposed rulemaking is published under Section 553(b) of title 5 to the much broader definition of a rule under Section 551(4) of title 5.[19] However, the definition excludes certain types of rules from coverage (e.g., rules of particular applicability relating to rates, wages, corporate or financial structures). Also, the bill would (1) define the term "economic impact" to include both direct economic effects and any indirect effect "which is reasonably foreseeable" and results from such rules;[20] (2) require IRFAs and FRFAs to include alternatives that would maximize any beneficial economic effects on small entities;[21] (3) require IRFAs and FRFAs for land management plans, as defined in the bill;[22] and (4) require IRFAs and FRFAs to contain greater details,[23] and to provide quantifiable or numerical descriptions of the rules effects or an explanation of why quantification is not practicable or reliable.

Section 4 of H.R. 527 would require the SBA Chief Counsel for Advocacy to issue rules governing agency compliance with the RFA. The bill requires these rules to be issued within 270 days after the date of enactment, after an opportunity for notice and comment. Also, agencies are prohibited from issuing their own rules on RFA compliance without first consulting with the chief counsel for advocacy. The chief counsel is generally authorized to intervene in any agency adjudication, informing the agency of any impacts on small entities, and is authorized to file comments in any agency notice requesting comments.

Section 5 of H.R. 527 would amend Section 609(b) of title 5, and would require agencies to notify the chief counsel for advocacy about any proposed rule expected to have a SEISNSE, or expected to have certain economic effects (even if the rule is not expected to have a SEISNSE). Those economic effects are defined as follows:

> (1) an annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, tribal organizations, or geographic regions; [or] (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[24]

This definition is the same as is used in the definition of a "major rule" in the Congressional Review Act (5 U.S.C. § 804(2)). For any proposed rule that the issuing agency or the OIRA Administrator expects to have a SEISNSE or be "major," the issuing agency is generally required to provide the chief counsel for advocacy with all materials used in the development of the proposed rule, and "information on the potential adverse and beneficial economic impacts of the

[19] That section defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing."

[20] Section 2(b).

[21] Section 2(c).

[22] Section 2(e).

[23] Section 3(a) and (b).

[24] Section 5(e).

proposed rule on small entities, and the type of small entities that might be affected."[25] Within 15 days after receiving these materials, the chief counsel is required to (1) identify affected small entities or their representatives from whom information about the impacts of the rule can be obtained, and (2) convene a "review panel" to examine the materials provided to the chief counsel. The panel is required to be composed of an employee from the Office of Advocacy, an employee from the issuing agency, and (unless the rule is issued by an independent regulatory agency) an employee from OIRA. Within 60 days after the panel is convened, the chief counsel for advocacy is required to submit a report to the agency and to OIRA (unless the rule is issued by an independent regulatory agency) assessing the economic impact of the proposed rule on small entities and any alternatives that would minimize adverse impacts or maximize beneficial impacts. The report is required to become part of the rulemaking record, and the agency is required to explain what actions the agency took in response to the report.

Section 6 of H.R. 527 would amend Section 610 of title 5 and require that each agency publish a plan for the periodic review of rules that the head of the agency determines have a SEISNSE, "without regard to whether the agency performed an analysis under section 604." The plans would generally require the review of all existing rules within 10 years of the date that the bill is enacted, and any subsequent rule within 10 years of its publication in the *Federal Register*. Agencies would be required to publish a list of rules to be reviewed, and to request comments from the public, the chief counsel for advocacy, and the regulatory enforcement ombudsman. Other sections of the bill would make certain changes to the judicial review provisions in Section 611 of title 5, and to the chief counsel's amicus authority under Section 612 of title 5.

Analysis of H.R. 527

Some of the provisions in H.R. 527 appeared to address certain long-standing issues of concern regarding the implementation of the RFA (e.g., the inclusion of "indirect" effects in the definition of "economic impact," and clarifying that Section 610 reviews are required for any rule determined to have a SEISNSE, even if an FRFA was not prepared). Other provisions appear to add to the number or depth of the analytical and notification requirements placed on rulemaking agencies. Perhaps most notably, the SBA chief counsel for advocacy is required to issue rules governing agency compliance with the RFA. If those rules clarify what is meant by the term "significant economic impact on a substantial number of small entities," they have the potential to improve the implementation of the RFA as well as related statutory requirements.

Other portions of H.R. 527 appear to widen the scope and impact of the RFA substantially. For example, by defining a covered "rule" using the definition in Section 551(4) of title 5, the RFA would appear to include not just legislative rules that appear in the *Federal Register* and the *Code of Federal Regulations*, but also agency guidance documents and policy statements. Also, the amendments to Section 609 of title 5 would, if enacted, substantially broaden the requirement for advocacy review panels. Currently, the requirements only apply to EPA and OSHA, and will extend to the CFPB when the agency is established in July 2010. H.R. 527 would, if enacted, expand the panel requirements to all agencies, and make them applicable to "major" rules, even if they did not have a SEISNSE. Also, some rules that are considered "major" impose no compliance costs, and instead are considered major because they involve more than $100 million in federal transfer payments (e.g., to Medicare and Medicaid providers, or as crop subsidies), fees for government services (e.g., passport application fees paid to the Department of State), or

[25] Section 5(b)(1)(B). Agencies are not required to provide drafts of proposed rules if the rule relates to U.S. internal revenue laws, or if it is to be issued by an independent regulatory agency.

consumer spending (e.g., migratory bird hunting rules issued by the Department of the Interior). Some observers have indicated that these changes to the RFA could affect agencies' ability to issue needed regulations,[26] while others have applauded the changes.[27] Both groups would likely agree that the amendments, if enacted, would fundamentally alter the nature and RFA's reach and requirements.

Other changes contemplated in H.R. 527 may have mixed effects. For example, for more than 20 years, courts have ruled that agencies need not prepare regulatory flexibility analyses if the effects of a rule on an industry are indirect.[28] Therefore, for example, if a federal agency is issuing a final rule establishing a health standard that is implemented by states or other entities, the federal agency issuing the rule need not prepare a regulatory flexibility analysis even if it is clear that the implementation ultimately will have significant effect on a substantial number of small entities.[29] Agencies have also indicated that they do not consider the secondary effects that a rule may have on the cost of compliance with other programs.[30] By clarifying that the term "economic impact" includes indirect effects that are "reasonably foreseeable and result from the rule," H.R. 527 might result in more agency rules being viewed as requiring an IRFA, an FRFA, or both.[31] Nevertheless, agencies appear to have substantial discretion in determining what indirect effects are "reasonably foreseeable," because the proposed legislation does not define that term. Also, even when the indirect effects of a rule are foreseeable, in some cases the agencies may not be able to provide much detail regarding those effects in their IRFAs and FRFAs (e.g., when the implementation details are left to states or local governments).

H.R. 527 would, if enacted, also clarify how agencies' reviews under Section 610 of the RFA should be conducted. As a result, agencies would be required to review all of their rules to determine if they currently have a SEISNE, and could not simply rely on their previous determinations when the final rule was published in the *Federal Register*. Enactment of this change could result in substantially more Section 610 reviews, but with a concomitant increase in time and effort required by federal agencies. However, it is unclear how this requirement for

[26] Testimony of J. Robert Schull before the Subcommittee on the Courts, Commercial and Administrative Law, House Committee on the Judiciary, February 10, 2011, at http://judiciary.house.gov/hearings/pdf/Shull02102011.pdf.

[27] Testimony of Thomas M. Sullivan before the Subcommittee on the Courts, Commercial and Administrative Law, House Committee on the Judiciary, February 10, 2011, at http://judiciary.house.gov/hearings/pdf/Sullivan02102011.pdf.

[28] See, for example, *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985).

[29] For example, when EPA published a final rule establishing national ambient air quality standards (NAAQS) for particulate matter in October 2006, the agency certified the rule as not having a SEISNSE "because NAAQS themselves impose no regulations on small entities." In its cost-benefit analysis for the rule, EPA estimated the cost of installing controls to meet the health standard at $5.6 billion in 2020. See U.S. Environmental Protection Agency, "National Ambient Air Quality Standards for Particulate Matter; Final Rule," 71 *Federal Register* 61144, 61217. In a similar case (*American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999)), affirmed in part and reversed in part, *Whitman v. American Trucking Associations*, 532 U.S. 457 (2001), the U.S. Court of Appeals for the District of Columbia ruled that EPA had complied with the RFA because the states, not EPA, had the direct authority to impose requirements to control ozone and particulate matter consistent with EPA health standards.

[30] For example, in a 1991 rule, EPA acknowledged that the rule in question may have "trickle down" effects on other EPA programs under the Clean Air Act (CAA), Superfund, or the Resource Conservation and Recovery Act (RCRA), but went on to say that "the purpose of today's action is solely to establish drinking water standards that public water systems must comply with. Consequently, EPA does not consider the cost of secondary impacts which may occur under the CAA, Superfund, or RCRA." U.S. Environmental Protection Agency, "Drinking Water; National Primary Drinking Water Regulations; Monitoring for Volatile Organic Chemicals," 56 *Federal Register*30266, July 1, 1991.

[31] The SBA Chief Counsel for Advocacy said his office's "biggest concern with the RFA is that it does not require agencies to analyze indirect impacts." See http://www.sba.gov/advo/press/07-38.html.

renewed plans for regulatory review will interact with similar requirements for retrospective analysis under Executive Order 13563, which was issued by President Barack Obama on January 18, 2011.[32] Section 6 of that order requires covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) to submit a preliminary plan to OIRA for the review of all of their existing rules.

More generally, a July 2007 report by GAO indicated that statutorily required regulatory reviews are less frequent, and may be less effective, than reviews undertaken at the agencies' discretion—thereby raising questions about the overall value of statutory review requirements such as Section 610 of the RFA. In that report, GAO said most "retrospective reviews" of agency rules between 2001 and 2006 were conducted at the agencies' discretion, not as a result of mandatory requirements such as Section 610.[33] GAO also said that discretionary reviews were more likely to involve the public in the process than mandatory reviews, and were more likely to result in changes to the rules. On the other hand, statutorily required reviews were more likely to have review standards, and were more likely to be documented. GAO recommended that agencies incorporate various elements into their policies and procedures to improve the effectiveness and transparency of retrospective regulatory reviews, and that they identify opportunities for Congress to revise and consolidate existing review requirements.

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Acknowledgments

This report originally was written by Curtis W. Copeland, who has retired from CRS. Congressional clients with questions about this report's subject matter may contact Maeve P. Carey.

[32] Executive Order 13563, "Improving Regulation and Regulatory Review," 76 *Federal Register* 3821, January 21, 2011.

[33] U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July 16, 2007.

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